Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

No. 74-1650

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

ST. JOE MINERALS CORPORATION, Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Third Circuit.

BRIEF FOR RESPONDENT, ST. JOE MINERALS CORPORATION, IN OPPOSITION TO THE GRANT OF THE PETITION FOR CERTIORARI

John McN. Cramer
Reed Smith Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Attorneys for Respondent

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
Opinion	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

CASES	PAGE
Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973)	8
Buckeye Power, Inc. v. EPA, 481 F.2d 162, (6th Cir. 1973)	8
Duquesne Light Co. v. EPA, 481 F.2d 1	4
Indiana & Michigan Electric Co. v. EPA, 509 F.2d [illegible] (7th Cir. 1975)	9
North Carolina v. Rice, 404 U.S. 244 (1971)	8
Train v. Natural Resources Defense Council, Inc. No. 73-1742, decided April 16, 1975, 43 L.Ed. 2d 731	8
Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir. 1975)	9

STATUTES AND REGULATIONS	
Administrative Procedure Act, as amended, 80 Stat. 381 et seq., 5 U.S.C. 551 et seq.	4
Clean Air Act	
§109, as amended, 84 Stat. 1679, 42 U.S.C. 1857c-4	2, 6
§110(a)(1), as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(1)	2
§110(a)(2), as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2)	1, 2
§307(b)(1), as amended, 84 Stat. 1707, 42 U.S.C. 1857h-5(b)(1)	3, 6
40 C.F.R. Part 51	2
25 Pa. Code 123.21(b)	3

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner

v.

ST. JOE MINERALS CORPORATION, Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Third Circuit.

BRIEF FOR RESPONDENT, ST. JOE MINERALS CORPORATION, IN OPPOSITION TO THE GRANT OF THE PETITION FOR CERTIORARI

OPINION

The Opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 508 F.2d 743.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Where the record does not show that an emission limitation contained in a state implementation plan submitted under §110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), is necessary to achieve a primary ambient air quality standard, and the record shows that the state did not

give serious consideration to the technological or economic feasibility of compliance with the limitation, is the Administrator of the Environmental Protection Agency required to give the emission limitation the force of a federal regulation when he has found the limitation to be technologically infeasible?

STATUTE INVOLVED

Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(2), is set forth in Petitioner's Appendix C.

STATEMENT

Section 109 of the Clean Air Act, as amended, 84 Stat. 1679, 42 U.S.C. 1857c-4, provides that the Administrator of the Environmental Protection Agency (EPA) should promulgate ambient air quality standards for substances to be determined by him. Ambient air quality standards are both "primary" and "secondary". Primary ambient air quality standards are intended to be those requisite to protect the public health; secondary ambient air quality standards are those necessary to protect the public welfare, in both cases with an adequate margin of safety. Section 110(a)(1) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c-5(a)(1), provides that each state within a specified period of time after the promulgation of ambient air quality standards must submit a plan for the implementation, maintenance and enforcement of the ambient standards. These submissions by the states are commonly referred to as implementation plans. To assist the states in developing implementation plans, the Administrator published regulations for their preparation. 40 C.F.R.

Part 51. Appendix B to those regulations was titled, "Examples of Emission Limitations Attainable With Reasonably Available Technology" ("Examples). The Examples included an emission standard for zinc smelters such as that operated by St. Joe Minerals Corporation, Respondent, (hereinafter, "Respondent" or "St. Joe"). The standard described in the Examples would have required St. Joe to capture approximately 94% of the potential sulfur oxide emissions from its zinc smelter. On January 27, 1972, the Commonwealth of Pennsylvania submitted its implementation plan to the Administrator. The only provision in the implementation plan governing sulfur oxide emissions from zinc smelters was one found at 25 Pa. Code 123.21(b) which governs sulfur oxide emissions from processes generally and does not refer specifically to zinc smelters. The Pennsylvania standard was substantially more restrictive than the standard proposed in the Examples issued by the Administrator. The Pennsylvania regulation required capture of approximately 97% of the potential sulfur oxide emissions from Respondent's zinc smelter.

On May 27, 1972, the Administrator approved the Pennsylvania Implementation Plan, thus giving the Pennsylvania standard in question the force of a substantive federal regulation. As a result, St. Joe was exposed to penalties under the Clean Air Act for violation of the regulation and to citizen suits in the federal forum to enforce the regulation against it. Therefore, on June 26, 1972, St. Joe filed a petition for review in the Court of Appeals for the Third Circuit pursuant to §307(b)(1) of the Clean Air Act, as amended, 84 Stat. 1707, 42 U.S.C. §1857h-5(b)(1), with regard to the action of the Administrator in approving the provision of the Pennsylvania Implementation Plan in question. On September

14, 1972 St. Joe filed a motion to remand the matter to the EPA for a hearing because of the failure of EPA to comply with the requirements of the Administrative Procedure Act, as amended, 80 Stat. 381 et seq., 5 U.S.C. 551 et seq., and procedural due process in approving the Pennsylvania Implementation Plan. On June 5, 1973 in an opinion reported at 481 F. 2d 1, the Court of Appeals for the Third Circuit granted Petitioner's Motion *sub nom Duquesne Light Co. v. EPA*.

As a result of the decision of the Court of Appeals for the Third Circuit with regard to St. Joe's motion for remand, administrative proceedings were conducted by EPA. In the proceeding on remand it became clear that, despite the fact that approximately half the zinc smelter capacity in the United States is located in Pennsylvania, Pennsylvania had adopted the standard in question without evaluating the technical or economic feasibility of compliance with it by zinc smelters and without giving consideration to whether the standard proposed by Pennsylvania, rather than the standard in the EPA Examples, was necessary in order to achieve ambient air quality standards. On March 18, 1974, the Administrator issued a decision in which he announced a finding that the Pennsylvania emission limitation for sulfur oxides as applied to zinc smelters was not technologically feasible and that therefore he would not reach the question of economic feasibility. He indicated that EPA would not enforce the Pennsylvania standard and that it would recommend to Pennsylvania that its standard be modified. However, the Administrator took the position that he did not have the power to disapprove a standard simply because it was technologically infeasible. The Court of Appeals for the Third Circuit rejected this contention, reasoning that when a provision of an

implementation plan is not technologically feasible and is not shown to be necessary for the attainment of an ambient air quality standard the Administrator is not obliged mindlessly to rubber stamp it into federal law.

On July 17, 1975, following public hearings, Pennsylvania adopted an amendment to its air pollution control regulations governing sulfur oxides emissions from zinc smelters. Compliance with the amended regulation appears to be technologically and economically feasible. With regard to St. Joe's operations, the amendment to the regulations supersedes the regulation which was the subject of the petition for review filed by St. Joe. Thus, the regulation which was the subject of the proceeding before the Court of Appeals and of the present Petition for Certiorari is no longer applicable to St. Joe.

ARGUMENT

1. There are no issues involved in this case which have sufficient importance to justify consuming the time of this Court in their resolution. Under the provisions of the Clean Air Act, implementation plans were to be submitted by the end of January 1972 and the Administrator was to take action with regard to approval or disapproval by May 31, 1972.* A petition for review of the action of the Administrator in approving an implementation plan must be filed within 30 days of the approval unless based on grounds arising after the 30th day.** Hence the time has long since passed for the filing of petitions for review based on the technical or economic infeasibility of an implementation plan.

The limited impact of the instant decision is confirmed by the fact that although the Petition for Certiorari was filed more than three years after the deadline for filing petitions for review, it cites only five other cases in the Courts of Appeals concerning review of the technical and economic feasibility of an implementation plan.

Moreover, the decisions cited in the Petition for Certiorari are primarily limited to cases involving the generation of electrical energy. EPA has repeatedly determined that emission limitations with regard to electric generation as stringent as the limitations found in the challenged implementation plans are technologically and economically feasible.

---

*Clean Air Act §§109 and 110, as amended, 84 Stat. 1679 and 1680, 42 U.S.C. 1857c-4 and 1857c-5.

**Clean Air Act §307(b)(1), as amended, 84 Stat. 1707, 42 U.S.C. 1857h-5(b)(1).

The instant case presents a highly unusual fact situation in that the Administrator had furnished the states with guidance as to the emission limitation attainable with reasonably available control technology for zinc smelting but the Commonwealth of Pennsylvania chose to ignore this guidance without determining that a more stringent limitation was either technologically attainable or necessary to achieve ambient air quality standards. It seems most unlikely that such a situation will arise with sufficient frequency to justify the consumption of the time of this Court in determining the appropriate manner in which to deal with it.

2. In addition, this matter appears to have become moot. On April 17, 1975, the Environmental Quality Board of the Commonwealth of Pennsylvania authorized the holding of public hearings on the adoption of a new regulation governing sulfur oxides emissions from zinc smelters which Respondent agrees is economically and technologically feasible. In connection with the proposed new regulation the Environmental Quality Board published supporting documentation which indicates that the proposed regulation is consistent with the attainment of primary ambient air quality standards. Public hearings were held on the proposed regulation on June 9 and 10, 1975. No material opposition to the proposed regulation was advanced at either hearing. On July 17, 1975 the proposed regulation was approved by the Environmental Quality Board to be effective fifteen days after publication in the Pennsylvania Bulletin on July 26, 1975. In the normal course of events the new regulation will be submitted to EPA as a revision of the implementation plan. Thus there is no longer any controversy between St. Joe and EPA with regard to the sulfur

oxides emission standard for zinc smelters in the Pennsylvania Implementation Plan. This Court should not attempt the resolution of the question presented by the instant Petition in a situation where the Respondent will no longer be affected by the outcome. *North Carolina v. Rice,* 404 U.S. 244 (1971).

3. The Petition suggests that certain language in the decision of this Court in *Train v. Natural Resources Defense Council, Inc.,* No. 73-1742, decided April 16, 1975, 43 L.Ed. 2d 731 ("NRDC"), appears to be inconsistent with the decision of the Court of Appeals in the instant case. However, the language in *NRDC* on which Petitioner relies does not constitute a holding of this Court but is simply dicta, not necessary to a resolution of the issue in *NRDC*. Moreover, it is clear from this Court's opinion in *NRDC* that the parties before it did not disagree with regard to the "analysis of the Act's division of responsibilities". 43 L.Ed. at p. 746. In fact the parties before this Court in *NRDC* had no incentive to raise the issue presented by the instant petition. Thus any comments of this Court which appear to be inconsistent with the ruling of the Court of Appeals for the Third Circuit in the instant case should be read in light of the absence of any adversary presentation in the *NRDC* case on the point presently at issue.

4. The alleged conflict in the circuits described in the Petition is more apparent than real. As noted in footnote 6 at page 7 of the Petition, the Court of Appeals for the Fourth Circuit appears to be in agreement with the decision of the Third Circuit in the present case. *Appalachian Power Co. v. EPA,* 477 F.2d 495, 505 (4th Cir. 1973). The decision in the Sixth Circuit in *Buckeye Power, Inc. v. EPA,* 481 F.2d 162 (6th Cir. 1973), and

the decision of the Seventh Circuit in *Indiana & Michigan Electric Co. v. EPA,* 509 F.2d 839 (7th Cir. 1975), recognized that technical and economic feasibility are relevant with regard to the enforcement of provisions of an implementation plan. Moreover, although these decisions do not require the Administrator to review the technological or economic feasibility of an implementation plan prior to its approval, neither of these decisions represents a holding on the precise issue in this case: namely, whether the Administrator is precluded from disapproving a provision of an implementation plan which he has found to be technologically or economically infeasible. Even the decision of the Court of Appeals for the Eighth Circuit in the case of *Union Electric Co. v. EPA,* 515 F.2d 206 (8th Cir. 1975)*, did not involve a situation where the Administrator had already made a finding that a provision of an implementation plan was technologically infeasible for an important industry. Thus the Court of Appeals for the Eighth Circuit did not have occasion to determine whether the Administrator is barred from acting on the basis of a previously made finding of technological infeasibility. Close examination reveals that no case has held that the Administrator is required to approve a provision of an implementation plan he has found to be technologically infeasible.

5. The question posed by the Petitioner is not in fact raised by the decision which is the subject of the present Petition for Certiorari. The decision of the Court of Appeals for the Third Circuit in the *St. Joe* case deals only with the question whether the Administrator has

---

*A Petition for Certiorari in the *Union Electric* case is pending at No. 74-1542.

the power to disapprove a provision of an implementation plan he has found to be technologically infeasible when the state had disregarded EPA guidance with regard to a technologically feasible emission limitation without offering any justification for doing so and when the state limitation had not been shown to be necessary to the attainment of primary ambient air quality standards. The instant case simply does not present the question whether the Administrator is required to make a determination "whether each element of a state's implementation plan is economically and technologically feasible for all sources of emissions affected by the plan." (Petition at page 9). It presents only the question whether the Administrator, once having made a determination of technological infeasibility with regard to a particular emission limitation for a particular source of emissions, has the power to act on his determination.

CONCLUSION

For the reasons set forth above the Petition for Certiorari should be denied.

Respectfully submitted,

John McN. Cramer
Reed Smith Shaw & McClay
Attorneys for Respondent,
St. Joe Minerals Corporation

Dated: July 30, 1975